

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

POLAROID CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 06-738 (SLR)
)	
HEWLETT-PACKARD COMPANY,)	
)	
Defendant.)	

**POLAROID'S ANSWERING BRIEF IN OPPOSITION TO HEWLETT-PACKARD'S
CROSS-MOTION TO PRECLUDE**

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July 28, 2008

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NATURE AND STAGE OF THE PROCEEDINGS

HP has filed a Cross-Motion To Preclude (D.I. 266) (“Cross-Motion”) and Memorandum In Opposition To Polaroid’s Motion To Preclude And In Support Of HP’s Cross-Motion To Preclude (D.I. 267) (“Cross-Motion Brief”). This is Polaroid’s answering brief in opposition to HP’s Cross-Motion.

SUMMARY OF THE ARGUMENT

HP’s Cross-Motion — coming weeks after Polaroid submitted its initial motion to preclude, in conjunction with HP’s opposition to Polaroid’s second preclusion motion, and which is conditioned upon the grant of Polaroid’s motion — is an attempt to divert attention from HP’s discovery abuses. Polaroid submitted all of the evidence referenced in HP’s Cross-Motion in accordance with this Court’s scheduling orders, and HP’s Cross-Motion lacks merit:

- Polaroid timely disclosed the allegedly “new” opinion contained in the declaration submitted by Polaroid’s technical expert, Dr. Peggy Agouris, regarding the Okada reference, which was *disclosed late by HP*.
- The declarations submitted by Dr. Agouris and Joseph P. Wroblewski regarding source code issues rebutted arguments *made for the first time* in HP’s motion to preclude Dr. Agouris’ testimony.
- This Court’s schedule provided for only two rounds of expert reports, and Dr. Agouris appropriately addressed HP’s rebuttal report on marking at her deposition in light of the schedule.
- The declaration of Polaroid’s survey expert, Walter McCullough, simply summarizes information given at his deposition and responds to issues *first raised in HP’s preclusion motion* directed at McCullough.
- Thomas Beaudoin’s declaration discusses only his personal background and Polaroid’s corporate history in response to HP’s summary judgment motion. Polaroid disclosed Beaudoin’s knowledge of this subject matter in its amended initial disclosures months before the close of fact discovery.

ARGUMENT

HP's contention that Polaroid submitted declarations and deposition testimony late is factually inaccurate, and HP's Cross-Motion should be denied. *See, e.g.*, FED. R. CIV. P. 37(c)(1) (providing for preclusion only where party "fails to provide information or identify a witness as required by [the rules of discovery]"); *In re TMI Litigation*, 193 F.3d 613, 722 (3d Cir. 1999); *Praxair, Inc. v. ATMI, Inc.*, 445 F. Supp. 2d. 460, 471 (D. Del. 2006); *Philips Elecs. N. Am. Corp. v. Contec Corp.*, No. Civ. A. 02-123-KAJ, 2004 WL 769371, at *1 (D. Del. Apr. 5, 2004).¹ HP has not identified — and did not experience — any prejudice as a result of Polaroid's timely submission of this evidence.

I. THE AGOURIS DECLARATION REGARDING THE OKADA REFERENCE — WHICH REBUTS HP'S UNTIMELY OKADA CONTENTIONS — COULD NOT HAVE BEEN SUBMITTED EARLIER.

HP belatedly disclosed opinions regarding the Okada reference, and the declaration submitted by Polaroid's expert, Dr. Agouris — responding to HP's eleventh hour contentions — was timely. D.I. 172 at 2–4; D.I. 246 at 1–4. HP's technical expert, Dr. Rangaraj Rangayyan, improperly filed two opening expert reports in this case. D.I. 271 at 2, n.1. His second opening report, filed on the same day that Dr. Agouris filed her rebuttal expert report, identified brand-new opinions regarding the Okada reference. *Id.* at 3. As a result of HP's untimely disclosure of the Okada reference opinions, Dr. Agouris *could not* rebut Dr. Rangayyan's new opinions in her rebuttal expert report. After HP relied on the Okada reference in its summary judgment motion, Dr. Agouris submitted her declaration to address the late-disclosed Okada reference. *See* D.I.

¹ Earlier-filed Polaroid briefs detail the applicable case law on preclusion. *See, e.g.*, D.I. 172; D.I. 246; D. I. 248; D.I. 271.

193, Ex. 3. To exclude the Agouris declaration regarding the Okada reference would reward HP for delaying disclosure of that reference in violation of this Court's scheduling orders.

II. THE AGOURIS AND WROBLEWSKI DECLARATIONS REGARDING SOURCE CODE PROPERLY RESPOND TO HP'S *DAUBERT* MOTION.

This Court should not exclude the declarations of Dr. Agouris and Wroblewski, which timely respond to HP's contentions regarding the scope of Dr. Agouris' expertise. D.I. 219, Exs. 2 and 4. HP's claims that these declarations contradict Dr. Agouris' deposition testimony regarding her expertise in computer software and computer hardware are baseless, as explained in earlier briefing. *Compare* D.I. 267 at 5, 18 *with* D.I. 219. Consistent with Dr. Agouris' deposition testimony,² these declarations explain the circumstances surrounding her analysis of the accused products in response to HP's mischaracterization of her knowledge and analysis. D.I. 219, Exs. 2 and 4. HP does not claim that the declarations contain new *opinions*, and they could not have been submitted before HP filed its *Daubert* motion.

III. DR. AGOURIS PROVIDED DEPOSITION TESTIMONY ON MARKING AT THE APPROPRIATE TIME.

In accordance with this Court's Amended Scheduling Order, and in response to HP's contentions regarding marking, Polaroid's technical expert appropriately provided testimony at her deposition.³ Dr. Agouris submitted an initial expert report on marking in which she addressed all of the claims in the '381 patent, including Claim 7. *See* D.I. 151, J.A. Ex. B, Agouris Rpt. at 95–96. For example, regarding the '381 patent's method claims (that include

² Even assuming HP were correct in its statements that the declarations are inconsistent with Dr. Agouris' deposition testimony — which it is not — preclusion is unwarranted as HP can explore these alleged inconsistencies on cross-examination at trial.

³ The parties have already briefed this issue. *See, e.g.*, D.I. 221 at 4–5.

Claim 7), Dr. Agouris stated, “Because Polaroid’s [dodge and burn/adaptive sharpening] technology does not embody any apparatus claim of the ’381 patent, it also does not embody the method claims of the ’381 patent which are directed at the use of the apparatus claims.” *Id.* HP’s expert Dr. Dan Schonfeld responded to Dr. Agouris’ expert report by filing his own report, focusing exclusively on Claim 7. DI. 268, HP Ex. D. As this Court’s schedule did not permit rebuttal reports, Dr. Agouris properly responded to Dr. Schonfeld’s contention during her deposition testimony. *See* D.I. 51, Am. Scheduling Order at Section 3(c)(1); 2/11/08 Order. Because Dr. Agouris could not have disclosed her rebuttal contention until after Dr. Schonfeld submitted his report, her timely testimony on marking should not be excluded.

IV. THE MCCULLOUGH DECLARATION PROPERLY RESPONDS TO HP’S DAUBERT MOTION.

The declaration of McCullough did not provide any new expert opinion, but rather summarized McCullough’s deposition testimony and responded to allegations in HP’s McCullough *Daubert* motion. D.I. 218, Ex. 2. It should not be excluded.

HP’s claim that McCullough “expand[ed] upon his alleged qualifications” is factually inaccurate. D.I. 267 at 4. Only two paragraphs of McCullough’s declaration discussed his qualifications. *See* D.I. 218, Ex. 2 at ¶ 3 (listing professional associations to which McCullough and his company belong) and ¶ 6 (detailing the number and types of surveys McCullough has conducted over 40 years). McCullough provided this same information in response to HP’s questioning at his deposition, as evidenced by Polaroid’s citation of *both* his testimony and his declaration in its opposition to HP’s *Daubert* motion. *See* D.I. 218 at 2, 18–19.

HP’s contention that McCullough “state[ed] *opinions* that attempt to justify various aspects of his survey methodology” is similarly inaccurate. D.I. 267 at 4. McCullough did not provide any additional opinions on his methodology, but rather explained the process of

designing his surveys in response to HP's *Daubert* contentions. D.I. 218, Ex. 2 at ¶¶ 4–5, 7–14. McCullough's statements regarding the knowledge attributable to a survey expert and the information such an expert would consider also appropriately addressed issues raised in HP's *Daubert* motion. Compare D.I. 165 at 13–14, 17–18 with D.I. 218 at 14, 17–18. There is no basis to preclude Polaroid from reliance on McCullough's declaration as it does not contain untimely disclosed opinions.

V. THE BEAUDOIN DECLARATION FALLS SQUARELY WITHIN THE SUBJECTS POLAROID IDENTIFIED FOR BEAUDOIN IN ITS FIRST AMENDED INITIAL DISCLOSURES AND PROPERLY ADDRESSES HP'S LACHES SUMMARY JUDGMENT MOTION.

HP's contention that Polaroid did not identify its then-current President, Chief Operating Officer, and Chief Financial Officer, Beaudoin, as a person "likely to have discoverable information regarding the issues or laches or equitable estoppel," distorts the facts. D.I. 267 at 20. On November 29, 2007 — months before the close of fact discovery — Polaroid disclosed Beaudoin in its amended initial disclosures as a person likely to have information about Polaroid's corporate history, which is *the only subject discussed in Beaudoin's declaration*. D.I. 268, Ex. E at 3; D.I. 195, Ex. 3.

HP demanded Beaudoin's deposition during fact discovery, but shortly before the deposition was to commence, HP unilaterally cancelled his deposition with no explanation. Polaroid Ex. A, Beaudoin Deposition Notice; Polaroid Ex. B, 1/21/08 and 1/29/08 Coburn Emails. HP's strategic choice not to depose Beaudoin during fact discovery after Polaroid timely disclosed him as knowledgeable on Polaroid's corporate history does not support preclusion of his declaration on that topic.

CONCLUSION

For the reasons set forth herein, HP's Cross-Motion should be denied.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Julia Heaney

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July 28, 2008
2428110

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on July 28, 2008, I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will send notification of such filing(s) to the following:

William J. Marsden, Jr.
FISH & RICHARDSON P.C.

I also certify that copies were caused to be served on July 28, 2008 upon the following in the manner indicated:

BY E-MAIL

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/s/ Julia Heaney

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

POLAROID CORPORATION,

Plaintiff and Counterclaim-Defendant,

v.

HEWLETT-PACKARD COMPANY,

Defendant and Counterclaim-Plaintiff.

C.A. No. 06-738 (SLR)

**NOTICE OF DEPOSITION OF
THOMAS L. BEAUDOIN PURSUANT
TO FED. R. CIV. P. 30(b)(1)**

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure, Hewlett-Packard Company, by its counsel, will take the deposition of Mr. Thomas Beaudoin at the offices of Fish & Richardson, P.C., 225 Franklin Street, Boston, Massachusetts 02110-2804, commencing at 9:00 a.m. on January 7, 2008, or at such other place and time as may be agreed upon by counsel. The deposition will continue from day to day until completed. Some or all of the deposition testimony may be recorded by stenographic, audio, audiovisual, video, and/or real-time computer means.

Dated: December 21, 2007

FISH & RICHARDSON P.C.

By: /s/ Matthew C. Bernstein

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, I served a copy of the attached on the following individuals in the manner indicated: **NOTICE OF DEPOSITION OF THOMAS L. BEAUDOIN PURSUANT TO FED. R. CIV. P. 30(b)(1)**

Via Email

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/s/ Matthew C. Bernstein

Exhibit B



"Bradley Coburn"
<coburn@fr.com>

01/21/2008 11:34 AM

To "David Higer" <dhiger@kirkland.com>

cc

Subject Polaroid v. HP - Beaudoin Deposition

Dear David:

HP is unable to take Mr. Beaudoin's deposition on January 24, 2008. Given that Polaroid has proposed the Zink deposition for January 30, 2008 in Boston, HP proposes that Mr. Beaudoin be deposed on either January 29 or January 31, 2008.

Best,

Bradley

Bradley D. Coburn

~ Fish & Richardson P.C.

111 Congress Ave., Suite 810

Austin, TX 78701

Direct Dial: 512.226.8111

Facsimile: 512.320.8935

bdc@fr.com

From: David Higer [mailto:dhiger@kirkland.com]

Sent: Monday, January 21, 2008 11:21 AM

To: Bradley Coburn

Subject: Polaroid v. HP - Correspondence

Please see the attached.

David W. Higer
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"Bradley Coburn"
<coburn@fr.com>

01/29/2008 02:44 PM

To "Maria Meginnnes" <MMeginnnes@kirkland.com>

cc

bcc

Subject HP/Polaroid: Deposition Issues

Dear Maria:

I write to advise Polaroid and the relevant third parties that HP will not be taking the Zink, Beaudoin, and Petters' depositions.

Additionally, we are still in the process of responding to Ms. Skinner's and Mr. Gerst's letters of yesterday.

Best,

Bradley

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